

1 VENABLE LLP
Jennifer Levin (SBN 252420)
2 jlevin@venable.com
Melissa C. McLaughlin (SBN 273619)
3 mcmclaughlin@venable.com
2049 Century Park East, Suite 2100
4 Los Angeles, CA 90067
Telephone: (310) 229-9900
5 Facsimile: (310) 229-9901

6 Attorneys for Defendant TRISTAR
7 PRODUCTS, INC.

8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 Jeanne Burns, individually and on behalf
12 of all others similarly situated,

13 Plaintiff,

14 v.

15 Tristar Products, Inc., a Pennsylvania
16 Corporation, and Does 1 through 50,

17 Defendant.

CASE NO. 14-cv-00749-JAH-DHB

Hon. John A. Houston
Courtroom 13B

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANT'S
MOTION TO DISMISS**

[Fed. R. Civ. P. 12(b)(1)]

Date: June 16, 2014
Time: 2:30 p.m.

Action Filed: April 1, 2014
Trial Date: None set

1 **I. INTRODUCTION**

2 Plaintiff Jeanne Burns' ("Plaintiff") claims for injunctive relief are incurably
 3 defective and must be dismissed. In her Complaint against Defendant Tristar
 4 Products, Inc. ("Defendant"), Plaintiff asserts various claims based on her purchase
 5 of an allegedly defective garden hose and seeks prospective injunctive relief.
 6 However, there must be a real and repeated threat that Plaintiff will suffer the
 7 alleged injury again in order to have standing to bring claims for injunctive relief.
 8 Plaintiff's allegations show that is she unlikely to purchase Defendant's product
 9 again, and therefore, she is not realistically threatened by a repetition of the alleged
 10 injury. Without any likelihood of future injury, Plaintiff lacks Article III standing
 11 to seek injunctive relief and her injunctive relief claims must be dismissed.

12 **II. STATEMENT OF FACTS**

13 Plaintiff filed her Complaint in the Superior Court of the State of California
 14 for the County of San Diego on January 9, 2014. (Dkt. 1-1["Compl."]). Defendant
 15 was served with the Complaint by mail on February 18, 2014, and removed this
 16 action to this Court on April 1, 2014. (Dkt. 1). In her putative class action
 17 Complaint, Plaintiff alleges violations of the Consumer Legal Remedies Act, Cal.
 18 Civ. Code § 1750 *et seq.* ("CLRA"), violations of California's Unfair Competition
 19 Law, Cal. Bus & Prof. Code § 17200 *et. seq.* ("UCL"), violations of California's
 20 False Advertising Law, Cal. Bus & Prof. Code § 17500 *et. seq.* ("FAL"), fraud by
 21 omission, breach of implied warranty of merchantability, and breach of implied
 22 warranty of fitness.

23 Plaintiff alleges she "purchased a Flex-Able Hose from Defendant's
 24 interactive website." (Compl. ¶ 2). She alleges she viewed a Flex-Able Hose
 25 infomercial prior to her purchase, in which statements allegedly emphasized the
 26 strength and durability of the product. (*Id.* ¶ 18). Plaintiff further alleges that she
 27 "believed that the Flex-Able Hose would be strong and would last a long time
 28 based upon Defendant's representations." (*Id.*). Plaintiff contends that "[t]he hose,

1 however, was not strong and durable. Instead, it leaked and ruptured shortly after
 2 her purchase. Had Plaintiff known that the Flex-Able Hose was a flimsy hose with
 3 a propensity to leak and rupture, she would not have purchased the product.” (*Id.* ¶
 4 7).

5 Throughout the Complaint, Plaintiff repeats her assertion that she would not
 6 have purchased the Flex-Able Hose had she known that the product allegedly
 7 contained an inherent defect and was not strong and durable. (*Id.* ¶¶ 7, 33, 58, Ex.
 8 A ¶ 3 [Declaration of Jeanne Burns re Civil Code Section 1780(D)]). Plaintiff
 9 expresses no intent to buy the Flex-Able Hose again.

10 **III. PLAINTIFF LACKS ARTICLE III STANDING TO SEEK**
 11 **INJUNCTIVE RELIEF BECAUSE THERE IS NO THREAT OF A**
 12 **REPEATED INJURY**

13 Plaintiff lacks Article III standing with respect to injunctive relief. A
 14 plaintiff in federal court has the burden of establishing standing under Article III,
 15 which takes priority over California’s more lenient standing requirements. *Cattie*
 16 *v. Wal-Mart Stores, Inc.*, 504 F. Supp. 3d 939, 942 (S.D. Cal. 2007); *see also Lee*
 17 *v. Am. Nat’l Ins. Co.*, 260 F.3d 997, 999-1000, 1001-02 (9th Cir. 2001). “Standing
 18 must be shown with respect to each form of relief sought, whether it be injunctive
 19 relief, damages or civil penalties.” *Bates v. United Parcel Serv., Inc.*, 511 F.3d
 20 974, 985 (9th Cir. 2007) (en banc). Arguments that a plaintiff lacks standing “are
 21 properly raised in a motion to dismiss under Federal Rule of Civil Procedure
 22 12(b)(1)” because standing pertains to subject matter jurisdiction. *White v. Lee*,
 23 227 F.3d 1214, 1242 (9th Cir. 2000).

24 Article III standing requires a present case or controversy, and it is well-
 25 settled that “[p]ast exposure to illegal conduct does not in itself show a present
 26 case or controversy regarding injunctive relief” *Lujan v. Defenders of*
 27 *Wildlife*, 504 U.S. 555, 564 (1992). Instead, standing requires that the plaintiff
 28 suffered an injury (1) “that is sufficiently concrete and particularized and actual or

1 imminent,” (2) “is fairly traceable to the challenged conduct,” and (3) “is likely to
 2 be redressed by a favorable decision.” *Id* at 560-61. The Ninth Circuit has
 3 explained that in order to satisfy the standing requirements under *Lujan*, a plaintiff
 4 seeking prospective injunctive relief “must demonstrate that he has suffered or is
 5 threatened with a concrete and particularized legal harm, coupled with a sufficient
 6 likelihood that he will again be wronged in a similar way.” *Bates*, 511 F.3d at 985
 7 (citations and internal quotations omitted).

8 The mere fact that a plaintiff has alleged a past wrong does not mean there is
 9 a likelihood of future injury. *Freeman v. ABC Legal Services, Inc.*, 877 F. Supp.
 10 2d 919, 926-27 (N.D. Cal. 2012). Although past wrongs can be evidence of a “real
 11 and immediate threat of repeated injury,” they do not “in themselves amount to [a]
 12 real and immediate threat of injury necessary to make out a case or controversy.”
 13 *Bates*, 511 F.3d at 985 (citations and internal quotations omitted). When
 14 allegations establish that a defendant may harm other people, but not necessarily
 15 that the defendant will harm the plaintiff again, there is no likelihood of future
 16 injury that would establish Article III standing for injunctive relief. *See Freeman*,
 17 877 F. Supp. 2d at 926-29.

18 Federal courts consistently and frequently dismiss claims for injunctive
 19 relief when there is no likelihood that the plaintiffs will purchase the allegedly
 20 falsely advertised products again. *See, e.g., Castagnola v. Hewlett-Packard Co.*, C
 21 11-05772 JSW, 2012 WL 2159385, at *6 (N.D. Cal. June 13, 2012) (granting
 22 motion to dismiss where “Plaintiffs do not allege that they intend to purchase
 23 products from Snapfish.com in the future or that, if they did, they would seek to
 24 participate in the Snapfish Valuepass program”); *Wang v. OCZ Tech. Group, Inc.*,
 25 276 F.R.D. 618, 626 (N.D. Cal. 2011) (Plaintiff who alleged that the defendant had
 26 misrepresented the performance of its solid state drives lacked standing to pursue
 27 injunctive relief because “any loss of value to Wang’s Agility 2 SSD has already
 28 occurred. If Wang paid an inflated price for the product based on OCZ’s alleged

misrepresentations, he is in no danger of doing so again.”); *Jovel v. Boiron, Inc.*, Case No. 11-cv-10803-SVW-SH, at *9 (C.D. Cal. Aug. 16, 2013) (granting motion for judgment on the pleadings where “Plaintiff admits in the FAC that ‘[h]ad Plaintiff known the truth about Defendants’ misrepresentations and omissions . . . Plaintiff would not have purchased Defendants’ Product . . . [and] Plaintiff concedes that he is now aware that Oscillo does not provide the advertised benefits”); *Bohn v. Boiron, Inc.*, Case No. 11 C 08704, at *8 (N.D. Ill. Aug. 1, 2013) (dismissing injunctive relief claim because “Bohn has not alleged that she personally will likely suffer future harm based on Boiron’s actions [and thus] Bohn lacks standing”); *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1151 (N.D. Cal. 2010) (most named plaintiffs and the purported class lacked standing because they did not allege that they still used their defective beds, would use those beds in the future, or would ever purchase another of defendant’s beds); *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 3d 939, 951 (S.D. Cal. 2007) (Plaintiff lacked standing to seek injunctive relief because “it is unclear how prospective relief will redress her injury, since she is now fully aware of the linens’ thread count” and she was not ‘realistically threatened by a *repetition* of the violation.’” (quoting *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006)).

In particular, the United States District Court for the Southern District of California has issued several recent rulings on this precise issue. For example, in *Mason v. Nature’s Innovation, Inc.*, No. 12cv3019 BTM(DHB), 2013 WL 1969957, at *5 (S.D. Cal. May 13, 2013), the court dismissed the plaintiff’s injunctive relief claims, holding that the plaintiff lacked standing to seek prospective injunctive relief. The court found that “it is apparent that Plaintiff has no intention of buying Defendant’s skin tag removal product again in the future. . . . Therefore, Plaintiff has not established the likelihood of future injury from Defendant’s alleged misrepresentations regarding the product and lacks Article III standing to seek injunctive relief.” *Id.* at *5. Similarly, in *Dorfman v.*

1 *Nutramax Labs., Inc.*, Case No. 13cv0873 WQH (RBB) (S.D. Cal. Sept. 23, 2013),
 2 the court dismissed the plaintiff's injunctive relief claims. The court explained that
 3 because "[t]he Complaint contains no allegations suggesting that Plaintiff would
 4 consider purchasing another Cosamin product by Nutramax," the plaintiff "failed
 5 to adequately allege that he faces a real and immediate threat of repeated injury."
 6 *Id.* at *14. (citations and internal quotations omitted). In *Allen v. Similasan Corp.*,
 7 Case No. 12cv0376-BTM-WMC, 2013 WL 2120825, at *4 (S.D. Cal. May 14,
 8 2013), the court likewise held that the plaintiff did not have standing to seek
 9 prospective injunctive relief because there was no likelihood that she would
 10 purchase the defendant's products again, and thus had no risk of future injury. The
 11 *Similasan* decision was reaffirmed when the court denied the plaintiff's motion for
 12 reconsideration, explaining that it was highly unlikely that she would ever buy the
 13 product again. *Allen v. Similasan Corp.*, Case No. 12cv0376-BTM-WMC, at *5
 14 (S.D. Cal. Aug. 7, 2013).

15 Here, Plaintiff seeks injunctive relief (Compl., Prayer for Relief ¶¶ 2, 3), but
 16 cannot show any possibility, let alone likelihood, that her alleged injury will occur
 17 again. Plaintiff does not allege that she plans to buy Defendant's product in the
 18 future. To the contrary, Plaintiff emphasized that she would not have purchased
 19 the Flex-Able Hose had she known that it was allegedly prone to leaks and
 20 rupturing. (*See, e.g.*, Compl. ¶¶ 7, 33, 58, Ex. A ¶ 3 [Declaration of Jeanne Burns
 21 re Civil Code Section 1780(D)]). Thus, it would be illogical and unreasonable for
 22 Plaintiff to purchase the Flex-Able Hose again. With no possibility that Plaintiff
 23 will purchase the product in the future, there is no likelihood that she will be
 24 injured by the alleged misrepresentations about the products. Therefore, she does
 25 not have standing to seek injunctive relief.

26 ///

27 ///

28 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendant respectfully requests that this Court
3 grant this Motion and dismiss Plaintiff's claims for injunctive relief with prejudice.
4

5 DATED: April 17, 2014

VENABLE LLP

7 By: /s/ Jennifer Levin

8 Jennifer Levin
9 Melissa C. McLaughlin
10 Attorneys for Defendant TRISTAR
11 PRODUCTS, INC.
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

VENABLE LLP
2049 CENTURY PARK EAST, SUITE 2100
LOS ANGELES, CA 90067
310-229-9900